

OCT 21 1980

CLERK SUPREME COURT

IN THE COURT OF APPEALS OF IOWA

LAWRENCE STOELK,	)	
Plaintiff-Appellant,	)	Filed October 21, 1980
vs.	)	
GREGORY SWANSON &	)	0-189
HAROLD SWANSON,	)	<u>2-62439</u>
Defendants-Appellees.	)	

Appeal from Carroll District Court - James C. Smith, Judge.

Plaintiff appeals from judgment for defendants in his negligence action. -
REVERSED AND REMANDED.

Allan H. Rauch, Des Moines, and John R. Ward, of Hedberg, Brick, Pratt, Tan & Ward, Des Moines, for plaintiff-appellant.

Russell S. Wunschel and James R. Van Dyke, of Wunschel Law Firm, Carroll, for defendants-appellees.

Heard by Oxberger, C.J., and Donielson, Snell, Carter and Johnson, JJ.

PER CURIAM

Plaintiff, Stoelk, appeals from judgment for defendants, Gregory and Harold Swanson, in his negligence action arising from a truck-tractor accident. We reverse and remand for new trial.

Stoelk was injured when the tractor he was driving was struck from behind by a pick-up truck driven by Gregory Swanson. Gregory and several of his friends had been socializing and drinking beer for approximately three hours during the evening prior to the accident. Gregory, accompanied by a friend, was drinking a beer while driving at the time of the accident. The tractor was not equipped with a red rear light, blinking lights or slow moving vehicle warnings. A rear light, white in color and located a little to the right of center of the tractor, was operating. It was dark, and the two-lane road and weather conditions were good. Gregory testified he observed a vehicle approximately one-half mile ahead of him, but was unable to discern its identity and speed and direction of travel until it was too late to avoid a collision. Officers at the scene smelled beer on Gregory's breath and observed his actions. They were of the opinion that Gregory was not intoxicated. Stoelk was lying in the highway, seriously injured, and required immediate attention. Gregory and his friend suffered lacerations and were treated at a hospital.

Stoelk filed his petition to recover for his injuries alleging Swanson was negligent. Swanson answered alleging Stoelk's contributory negligence. Stoelk requested that Iowa Uniform Jury Instruction 2.14, concerning intoxication of defendant, be given to the jury. The court refused. The jury found for defendant. Stoelk moved for new trial and when that motion was overruled, appealed the entire cause. Our review is on error assigned. Iowa R. App. P. 4.

I. Stoelk maintains the requested instruction dealing with the standard of care of intoxicated drivers was necessary to the jury's determination of the matter. We agree.

Swanson urges the evidence is not sufficient for an instruction on the intoxication issue. More than a mere scintilla of evidence is necessary. Weindenfeld v. Chicago & Northwestern Transportation Co., 252 N.W.2d 691 (Iowa 1977). Circumstantial evidence may be sufficient if it establishes a theory to be reasonably probable, not merely possible, and more probable than any other theory based on the evidence; but the evidence need not exclude every other possible theory. Generally it is for the jury to

determine if this test was met. Iowa R. App. P. 14(f)(16). In this case there was evidence of Swanson's beer consumption during the evening; the noticeable beer odor on Swanson's breath and the empty beer cans on the scene. This testimony supports the issue of possible impairment due to intoxication. Even though no one observed or opined that Swanson acted under the influence of intoxicating liquor, such outward manifestation of the effects of alcohol is not the exclusive means to show possible impairment or influence. Sauer v. Scott, 176 N.W.2d 140, 144 (Iowa 1970). We find sufficient evidence concerning this issue for submission and instruction to the jury.

II. Swanson next urges the issue was included in the offered instruction on proper lookout and control. We disagree. The instruction on lookout and control stressed appropriate speed and watchfulness. The offered instructions did not address the possible impairment of reflex and reason that would affect Swanson's ability to provide the reasonable degree of care required. Finding error in omission of requested instruction, we reverse the trial court and remand for new trial.

REVERSED AND REMANDED.